Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1999

ERNEST McDUFFIE, III, d.b.a.
D&M Contracting Company

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent,

Petition For a Writ Of Certiorari
to the United States Court Of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

The issues presented for review are:

I. Whether Respondent is the recipient of Federal Financial Assistance Funds.

II. Whether Respondent is a program or activity that must comply with public law 88-352 Title VI of the Civil Rights Act of 1964 as amended.

III. Whether Respondent must comply with section 3 of The Small Business Act;

IV. Whether Respondent must comply with the code of Federal Regulation C.F.R. 13 parts 101 through 318.

V. Whether Respondent has provided a definitive definition of what constitutes a 7(a) 2 Loan.

VI. Whether Respondent made the loan to appellant as a participant in the 8(a) program pursuant to 13 C.F.R. (ch.1) 1-1-91 Edition part 122.59-1 in relevant part.

VII. Whether Respondent had full knowledge that the loan proceeds were used and with authorization by the Appellee for completion of the St. Andrew project.

VIII. Whether Respondent had full knowledge that the loan proceeds were used on the S.B.A. 8(a) ASR Facility contract.

IX. Whether Respondent from 1991, through 1997 did the greatest extent feasible or make an extra effort in awarding contracts to Appellant as an 8(a) participant to repay the loan under Federal Regulation C.F.R. 13.

X. Whether Respondent did the greatest extent feasible or make an extra effort to extend the maximum time to the Petitioner as an 8(a) participant under Federal Regulation C.F.R. 13 to repay the loan.

XI. Whether the affidavits of Magadelene W. McDuffie and Melanese D. Way should be entered as a part of the evidence in this case.

XII. Whether Petitioner has made a prima facie case under Title VI C.F.R. 13 Federal Regulations.

XIII. Whether the Respondent has provided a substantial legitimate justification for its practice under Title VI C.F.R. Federal Regulations.

XIV. Whether The City of Jacksonville Florida has a personal interest in the outcome of this case.

XV. Whether First Union Bank of Florida has a personal, interest in the outcome of this case.

XVI. Whether Respondent from 1991 through 1997 intentionally treated Petitioner differently as an 8(a) participant under federal regulation C.F.R. 13 in the awarding of contracts and the maximum time extension to repay the loan than the Respondent treated other 8(a) participants.

XVII. Whether the Court deny Petitioner's their rights to discovery under the Law.

XVIII. Whether the court denied Petitioner's their rights to due process of law: under the 14th Amendment of the U.S. Constitution.

XIX. Whether the partnership between the Small Business Administration (SBA) of Jacksonville Florida, The City of Jacksonville Florida and First Union National Bank of Florida made an hostile environment for the Petitioner to be awarded contracts to repay the loan from 1991 through 1997.

LIST OF PARTIES

The Parties to the proceedings in the court below; Petitioner, Ernest McDuffie, III, doing business as D & M Contracting Company, a sole proprietorship, located in Jacksonville Florida, and is not a subsidiary of any other corporation.

The Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ernest McDuffie, III respectfully petitions the court that a writ of certiorari be issued to review the order entered by the United States Court of Appeals 11th Circuit, dated December 30, 1999.

OPINIONS BELOW

The opinions of the Court of Appeals is reprinted in the Appendix commencing at page 1a.

JURISDICTION

Jurisdictions before the District Court exist under 42 U.S.C. 2000d-1. The District Court entered summary judgment on October 14, 1998. November 6, 1998, a summary judgment was entered. Petitioner filed notice of appeal from the judgment. Jurisdiction existed under 28 U.S.C 1291. January 17, 2000, Petitioner filed a timely petition for rehearing. Rehearing was denied on February 24, 2000.

Jurisdiction of this court exists under, the 14th Amendment to the United States Constitution, Public Law 88-352, Title VI of the Civil Rights Act, 1964, as amended and 28 U.S.C 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Amendment XIV

The Fourteenth Amendment to the United States Constitution provides in relevant part: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law' nor deny to any person within its jurisdiction the equal protection of the Laws.

Section 601

Public Law 88 - 352 Title of the Civil Rights Act of 1964, as amended, in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits, of or be subjected to discrimination under any program or activity receiving Federal assistance."

42 U.S.C. 2000d-4a

42 U.S.C. 2000d-4a, provides in relevant part: "that a program or activity" (or just a program") includes "all the operation of" any one of a number of entities, subject only to the provso that at least one (or, as the statute provides, "any") "part of" that entity's

operation "is extended Federal financial assistance."

Executive Order 12250 1-201(a)(d)1-201
Coordination of Non-discrimination Provisions, provides in relevant part" The Attorney General shall coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of the following laws: (a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); Any other provision of Federal statutory law which provides in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal assistance.

13 CFR Part 112.2(b)
Code of Federal Regulation 13 CFR Part 112.2 (b) provides in relevant part: "The term Federal financial assistance includes: (1) grants and loans of Federal funds: (2) the grant or donation of Federal property and interest in property; (3) the detail of Federal personnel: (4) the sale and lease of, and the permission to use on other than a casual or transient basis, Federal property or any interest in such property without consideration or at a nominal consideration which reduced for the purpose or assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient; and (5) any Federal agreement, arrangement , or other contract which has as one of its purpose the provision of assistance."

13 CFR Part 112.2(d)

Code of Federal Regulation 13 Part 112.2(d), provides in relevant part: "The terms applicant and recipient mean, respectively, one who applies of and one who receives any of the financial assistance under any of the statues referred to in paragraph (a) of this section, the term recipient also shall be deemed to include subrecipients of SBA financial assistance, i,e., concerns which secondarily receive financial assistance from primary recipients of such financial assistance."

STATEMENT OF THE CASE

Respondent filed complaint 2/11/99. Petitioner demanded a trial by jury on all issues triable before a US District Court judge on 3/20/97.
A motion for summary final judgment was filed on 11/25/97, by the Respondent.

Petitioner filed a motion for denial of summary final judgment on 12/15/97. First request for discovery and production of document was filed by Petitioner on 1/31/98. Motion for an order compelling discovery and request for hearing filed 3/10/98, by Petitioner.

Judgment entered 10/16/98, in favor of Respondent. Petitioner filed 10/22/98, a motion to amend order. 11/16/98 Notice of Appeal filed by Petitioner.

BACKGROUND

Pursuant to Rule 56, Federal Rule of civil Procedure, summary judgment is not appropriate if initial burden of production is not met. Respondent failed to meet the initial burden of production prior to filing its motion for summary judgment.

Respondent made the loan to petitioner with full knowledge that, petitioner was a participant in the 8(a) program and receiving 7(j) assistance; petitioner was under contract with The Small Business Administration section 8(a) to complete an ASR-9 facility, at the request of the SBA. The loan process started in August 1991 after a telephone conversation with assistant regional administrator for Minority Small Business and Capital Ownership Development, in late July 1991.

Petitioner was receiving assistance under 7(j)(10) and Section 8(a). The loan application was signed on November 12 1991; Barnett Bank advanced loan proceeds (with prior SBA approval) before the final closing of the loan on August 27 1992 and full disclosure was made to The Small Business Administration.

A. Affidavit of Small Business Administration Assistant District Director/Economic Development, given in bad faith Affiant states at paragraph 6, "McDuffie was approved for and obtained a general 7(a)(2) loan" and appellee page 3, paragraph 2 states, petitioner sought and obtained the loan for which he

was eligible a general 7(a)(2) loan."

1. Petitioner did not apply for 7(a)(2)' loan which is supported by Respondent's own statements. Secondly, nothing on or in Respondent Exhibit 3 supports that a 7(a)(2) loan was the type of loan Petitioner sought, was approved for or obtained,. The application is one of several genetic applications used to apply for a business loan from the Small Business Administration.

B. Petitioner had no knowledge of a 7(a)(2) loan, further Respondent has not provided a definitive definition of what constitutes a 7(a)(20 loan.

1. Affiant states at paragraph 11, "8(a) program loans are the exception rather than he rule."

-The conditions which required Petitioner's need for a loan were exceptional circumstances with far reaching results; The circumstances were discussed not only with the Bank but with representatives from the Small Business Administration locally and regionally.

2. Affiant states at paragraph 12, "8(a) loan proceeds cannot be used for debt repayment."

3. Pursuant to 13 CFR ch. 1 (1-1-91 Edition) at 120.102-1, SBA proceeds can be used for debt repayment, "provided, however, that (subject to intervening adverse change) SBA may reimburse a lender's interim advance from loan proceeds if made in compliance with a loan authorization previously issued by SBA." The SBA gave the bank (Barnett)

prior approval to advance funds from loan proceeds to be used on the St. Andrew project. (See Petitioner's Exhibit #2, previously submitted.) (McDuffie v. First Union National Bank,U.S. Supreme Court No. 97-1533 October term 1997.)

C. Additionally loan proceeds were for payment of the SBA 8(a) ASR facility contract, in which the petitioner had been wrongfully terminated by the government, as determined by the court (Docket Nos. 2540, 2548, 2679).

1. Respondent admits being aware of Petitioner being "a participant in the SBA 8(a) program." However, certifications in bad faith that the "participant in the 8(a) program had no bearing on SBA's approval of the loan or type of loan received."

D. The loan was a loan made to a participate in the 8(a) program pursuant to 13 CFR ch. 1(1-1-91 Edition) part 122.59-1, in relevant part:
The Act authorizes the Administration to make loans either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis to small business concerns receiving assistance under subsection 7(j)(10) and section 8(a) of the Act; ie., firms which are presently participating in the section 8(a) program and are eligible for contractual assistance under section 8(a) of the Act; andnot firms which may be eligible for the program."

E. Affiant states at paragraph 13, "in his loan application, McDuffie did not request proceeds for

inventory purchase and his working capital request did not indicate an intent to restrict its us to supplies and material."

1. The Respondent previously admitted knowing the Petitioner was an 8(a) participant and was also aware the proceeds would be used for working capital, material, supplies, and inventory on the SBA 8(a) ASR-9 facility and the St. Andrew project. Additionally, Respondent did not indicate where on the application (Respondent Exhibit 3) the restriction should have been made.

2. Petitioner had disclosed to the SBA and Barnett as required by policy of any pending lawsuits, circumstances, etc. The details were provided as Exhibit H in answer to question 9 of the SBA loan application (See Appellee's Exhibit 3 page 3).

F. Affiant states at paragraph 16, "the 7(a) loan program has no interrelationship with the 8(a) program; the two are mutually exclusive."

3. While affiant's statement may or may not be true, "Congress has authorized several special purpose programs in various sub-sections of the Section 7(a). As with other business loans, special purpose loans are available only to the extent funded by annual appropriation." One such appropriation is loans to participants in the 8(a) program.

G. Pursuant to 13 CFR ch. 1(1-1-97 Edition) part 120.375, "SBA can provide direct (unilaterally or together with Lenders) or guaranteed loans to firms

participating in the 8(a) program." Further pursuant to 13 CFR ch. 1 (1-1-91 Edition) part 122.59-1, the Act authorizes the Administration to make loans either directly or in cooperation with banks or other financial institutions through agreements to participate an immediate or deferred (guaranteed) basis to small business concerns receiving assistance under subsection 7(i)(10) and section 8(a) of the Act; ie, firms which are presently participating in the section 8(a) program and are eligible for contractual assistance under section 8(a) of the Act." The loan referenced are not made 8(a) loans but 7(a) loans made "to participate in the 8(a) program.

1. Petitioner respectfully request to amend its discovery request 2 to read, all Section 7(a) loan documents made to participants in the 8(a) program.

2. Petitioner reaffirms discovery request 3 of all contracts to 8(a) contractors in the U.S. Small Business
Administration's Region IV's 8(a) program from 1984 through 1994.

3. Petitioner reaffirms and discovery request 8 of identify by case number, or other such identifiable administrative proceeding number all claims for causes of action that the U.S. Small Business Administration has ever brought against 8(a) participants from 1984 through 1997. (Elston v Talladega No.92-6033).

4. Petitioner submits affidavits of Magadelene W. McDuffie and Melanese D. Way, in support of this brief dated June 27, and 29, 1998. See Petitioner

motion for an order to alter or amend court and dated October 14, 1998, (See Docket #62).
"ELSTON v. TALLADEGA No. 92-6033. "We review the district court's refusal to exercise independent jurisdiction over the Alabama Open Records Act claim for abuse of discretion. See Phillips v. Smalley Maintenance Services, Inc., 711 F. 2d 1524,1531 (11th Cir. 1983). We also review for abuse of discretion the district court's orders denying plaintiffs' request to supplement the record on remand and refusing to require defendants to comply with discovery request regarding events occurring prior to the 1985-86 school year.

H. The Respondent failure to comply with Federal Rules 56(f). In the Celotex v. Catrett, decision "allows a summary judgment motion to be denied, or the hearing on the motion to be continued if the no-moving party has not had an opportunity to make full discovery.

The court ruled in the Celotex v. Catrett,[1] "no serious claim can be made that respondent was railroaded by a premature motion for summary judgment since the motion was not filed until one year after the action was commenced and since the parties had conducted discovery.

I. Respondent from 1992 through 1997 did not make the greatest extent feasible to contract with

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[1] Celotex Corporation Petitioner v. Myrtle Nell Catrett, Adminstratix of the estate of Louis H. Catrett, deceased 477 US 317.91 L Ed 2d 265.106 ct 2548 (no.85-198) argued April 1, 1986, decided June 25, 1986.

Petitioner. Pursuant to Ramirez Leal[2] & Co v. City Demonstration Agency the Court upheld extra effort in awarding contract to businesses traditionally left out. The court stated: "they were required, to the greatest extent feasible ... we think that the greatest extent feasible ... we think that greatest extent mean what it says the maximum and that the Defendants were therefore obliged to take every affirmative action that they could properly take.

J. The Respondent of recipient is defined in the Grove City College v. Terrel H. Bell[3]; defined recipient to include "[a]ny public or private agency institution or organization or other entity or any person to whom federal financial assistance is extended directly or through another receipt and which operates and education program or activity which receives or benefits from such assistance."

K. In the Associated of Mexican Educators v. The State of California,[4] the court stated:

"Plaintiff's under Title VI of the Civil rights which prohibits use of federal funds to subsidize racial discrimination may maintain private right of action based on administrative regulations promulgated pursuant to Title VI; Supreme Court has held that those regulations are valid and that they further congressional purpose of with holding federal funds for discriminatory practice (Civil Rights of

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[2] Ramirez Leal & Co. Plaintiff-Appellant v. City Demonstration Agency, Defendants-Appellees, no 75-1024 United States Court of Appeals Ninth Circuit Oct. 1976.

[3] Grove City College v. 79L. Ed. 2d 516 No. 82-792.

[4] Association of Mexican American Educators v. The State of California Commission Teacher Credentialing, No C-92-3874 WHO, US District Court N.D.

1964, 601 as amended 42 USCA 2000d)."

L. A premature partial summary judgment also denies the appellant constitutional rights afforded Black African-Americans, under the equal Protection Provision of the U.S. Constitution Amendment 14, which states:

"All persons born or naturalized in the United States thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the same states: Nor shall any state deprive may person of life, liberty, or property without due process of law, not deny to any person with its jurisdiction the equal protection under the law."

The granting of summary judgment without first meeting the requirements of Rule 56, of affirmatively demonstrating that there is no evidence in the record to support a judgment for the non-movant, and the overlooking or ignoring of evidence on file at the time of the ruling. (See The Court Case of: (Crawford v. Lamantia No. 89-5927, USCA, 1st Cir. (1994) Also see Court case: Adams v. Sewell, et al., Defendants, No. 90-3645, Which reads:

[11] The Due Process Clause requires that termination of a property right to continued employment must be preceded by notice and an opportunity for a hearing on the matter. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950). The Supreme Court has held that pretermination procedures need not elaborate; "[t]he tenured public

employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Loudermill, 470 U.S. at 546, 105 S. Ct. at 1495. In Loudermill, the Court noted that cursory pre-termination proceedings may be acceptable if the employee is entitled to a full evidentiary hearing within a reasonable time after termination. Id. at 546-47, 105 S. Ct. At 1495-96.

M. Respondent failed to comply with CFR 13 part 121 section 3 and part 124 section 8(a) of the Small Business Act and the Small Business Investment Act of 1958, as amended.

As an African-America SBA 8(a), General Contractor from 1984 through 1994, I was required to comply with all the Federal rules and regulation under CFR 13 part 124. If I did not comply, I would be removed from the 8(a) program (see Exhibit 2 pages 7 and 7-A). From 1992 through 1994, even though I remained eligible for contract assistance, the SBA failed to provide that support; knowing that governmental contracts would be the source of the loan repayment. Furthermore, the option to extend the life of the loan to reduce the loan payment was never offered, even though there is a provision to extend the loan up to twenty-five (25) years, which have been employed in other cases.

Respondent from 1992 through 1997 did not exercise the "extra effort in awarding contracts to business traditionally left out of the bid and award process.. shall be given the greatest extent feasible." Also the record will show that the Petitioner was not given the "greatest extent feasible" in terms to repay the loan off as a 8(a) participant (see Exhibit 2 pages

1 and 2). The court In the Ramirez Leal & Co., Plaintiff Appellant v. City Demonstration Agency. Defendants-Appellees, No. 75-1024 United States Court of "Appeals Ninth Circuit Oct. 1976, as amended upheld extra effort in awarding contract to businesses traditionally left out. The court stated: "they were required, to the greatest extent feasible ... we think that greatest extent means what it says the maximum and that the defendants were therefore obliged to take every affirmative action that they could properly take..."

N. The respondent violated the Petitioner Civil Rights pursuant to Public Law 88-352 of the Civil Rights Act of 1964, as amended and CFR 13 part 101 through 318 which mandates nondiscrimination in federally assisted programs, "no person in the United States shall on the ground of race, color or national origin ... be denied the benefits of or be subjected to discrimination under any program or activity receiving federal assistance. As cited in the Grove City College v. Terrel H. Bell, 465 US 55, 79 L. Ed. 2d 516 No. 82-792, a "recipient" is defined in 34 CFR 106.2(h), to include:

"[a]ny public or private agency, institution or organization or their entity or any person to whom federal financial assistance is extended directly or through another recipient and which operates and education program or activity which receives or benefits from such assistance -"

O. The Association of Mexican American Educators v. The State of California Commission on Teacher Credentialing, No. C-92-3874 WHO, US District Court, N.D., states Plaintiffs under Title VI of

Civil Rights Act which prohibits use of federal funds to sudsidize racial discrimination may maintain private right of action based on administrative regulations promulgated pursuant to Title VI; Supreme Court has held that those regulations are valid and that they further congressional purposed of withholding 1964, 601, as amended, 42 USCA 2000d."

A premature summary judgment also denies the appellant his constitutional rights provided to Black African-Americans under the Equal Protection Provision of the U.S. Constitutional Amendment 14, which states in Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection under the law."

P. According to the case of Brown vs. Crawford, No 89-5927 USCA, 11th Cir (1990) 2544, the court states: while a pro se litigant does not escape essential burden under summary judgment standards of establishing that there is genuine issue as to a fact material to his case in order to avert summary judgment, court of appeals must view factual inferences favorably toward part not moving for summary judgment and pro se complaints are entitled to liberal interpretation by the court. Title VI of the Civil Rights Acts of 1964 (42 U.S.C. 2000d),

Any other provision of Federal statutory law which provides, in whole or in part, that no person in

the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal assistance.

Q. The Respondent S.B.A. is a recipient of federal financial assistance funds in this action. Pursuant to Moreno v. Consolidated Rail Corporation, nos. 94-1231, 94-1247 United States Court of Appeals Sixth "Circuit, Nov., 1996, "by accepting federal funds for its railroad crossing improvements, railroad was a 'recipient of federal assistance' within meaning of the Rehabilitation Act, even though Federal funds came to the railroad through state of Michigan rather than . . . by United States directly, and members of traveling public were ultimate beneficiaries of funds in issue; railroad owned and operated railroad crossing improvements and federal government paid for obligation that railroad would otherwise have had to pay out of its own funds, subject in some case or equal sharing of costs with local public authorities." Further, as the statute makes clear, plaintiff must demonstrate that the defendant was a receipient of federal financial assistance. (Dowell v. Apopka)

But according to case, "Grove City College v. Bell 645 US 55, 79 (1984)," the Supreme Court, held that Title VI nondiscrimination provision only covered the particular program receiving federal funds, the Civil Rights Restoration Act of 1987 went further to include the entire organization of a federal fund's recipient. "Recipient means any state or political subdivision thereof, or any instrumentality of a stte or political subdivision hereof, or any

instrumentality of a state or political subdivision hereof, any public or private agency, institution, or organization or other entity, or any person, to whom federal financial assistance is extended directly or through another recipient and which operates a program of activity which receive or benefits from such assistance, including any submit successor, assigned or transferee thereof."

According to Title VI case, "Hodges by Hodges v. Public Building Commission of Chicago," No. 93 c 4329. U.S. District Court, N.O. Illinois, Eastern Division, Sept. 14, 1994, where a similar defense of not receiving federal assistance was given, the court stated:

"All of the parties place far too much importance on whether or not the defendants actually receive federal funding. In the post CRA era, whether or not an entity receives federal funds is no longer the sine qua non of a title VI action.
Consistent with the he broad definition of "program or activity" courts have rejected such a formalistic approach in favor of examining the defendant's relationship to the entity receiving the federal funds."

Also, in the case association of Mexican American Educators v. The State of California commission on teacher credentialing No. C-92-3874 WHO, U.S. District Court, N.D. California Aug. 25 1993, the court states: "Plaintiffs under Title VI of civil rights act, which prohibits use of federal funds to subsidize racial discrimination, may maintain private right of action based on administrative regulations promulgated pursuant to Title VI; Supreme Court has held that those regulations are valid and that they

further congressional purpose of withholding federal funds from discriminatory practices."

In the order dated October 14, 1998 the court did not state that the appellant did not make a prima facie case under Title VI Federal Regulations. Therefore, the burden shifts to the appellee the S.B.A. to prove substantial legitimate justification for its practice.

As stated in: Georgia State Conference of Branches of NAACP - Appellants v. State of Georgia - Appellees No. 84-8771. United States Court of Appeals Eleventh Circuit Oct. 29 1985. The court stated:

"Plaintiff, who asserts disparate impact claim under Title VI of Civil Rights Act of 1964 601 et seq.. 42 U.S.C.A. 2000d et seq. must show by preponderance of evidence that facially neutral practice has racially disproportionate effect, whereupon burden shift to defendant to prove substantial legitimate justification for its practice; plaintiff then may ultimately prevail by proffering equally alternative practice which results in less racial disproportionate or proof that legitimate practices are pretext for discrimination."

The court also stated:

"Generally, to establish prima facie case of disparate impact base on race plaintiffs must show that defendants' racially neutral practice detrimentally affects person of particular race to greatest extent than other races. Civil Rights Act of 1964 601 et seq., 42 U.S.C.A. 200d et seq."

In this case: Respondent the S.B.A. have not provided a substantial legitimate justification for its

practice of violations under Title VI Federal regulations.

R. Respondent the Small Business Administration of Jacksonville Florida, partnership with the City of Jacksonville Florida and First Union National Banks, in the Jacksonville Economic Development Company Incorporation (JEDCO). That was founded in 1980 created a hostile environment for the Petitioner to be awarded contracts in the City of Jacksonville Florida area to repay the loan from 1991 through 1998 see court cases No. 97-1533 and No. 99-660.

REASONS FOR GRANTING THE PETITION.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE U.S. SUPREME COURTS' OPINION IN CELOTEX AND RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Petitioner submitted affidavits pursuant to Rule 56(e), however the Court of appeals' opinion does not reflect that the affidavits of individuals with first hand personal knowledge was considered.

The Supreme Court in Celotex v. Catrett maintained that Rule 56(e) of Federal Rules of Civil Procedure, did not indicate that evidence must be structured for trial, "we do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary

material listed in Rule 56(c) except the mere pleadings themselves."[13] [477 US 324][5]. The motion for summary judgment was filed prematurely by Respondent.

II. THE COURT OF APPEAL'S DECISION BRINGS INTO QUESTION HOW ADVERSE OF IMPACT DOES AGREEMENTS, ARRANGEMENT OR OTHER SPECIAL CONTRACTS, HAVE ON A GROUP PROTECTED BY TITLE VI.

The court stated "Elston vs. Talladega County Board of Education 997 F. 2d 1394, 1406 (11th Cir. 1993), "when regulations are promulgated pursuant to Title VI, they "may validly proscribe. Actions having a disparate impact on groups protected by the Statue, even if these actions are to intentionally discriminatory." (Citation omitted.) The court ruled in McDuffie v. First Union Bank the Regulations Cited by the Plaintiff appear to proscribe action "having a disparate impact "on groups protected by the statue" se 15 CFR part 8, subpart a, sec 8.4 (b) (2) - (3) and compare with Elston, 999 F. 2d at 1407 N. 12 Quoting relevant department of education title VI regulation. For purpose of disparate impact standard." (McDuffie v. First Union - No. 97-1533).

As stated in Elston "to establish liability under the Title VI regulation disparate impact scheme a plaintiff must -- demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI." 97 F. 2d at 1407.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE FOURTEENTH (14TH) AMENDMENT TO THE UNITED STATES CONSTITUTION "DUE PROCESS CLAUSE" COURT'S OPINION IN ADAMS V. SEWELL.

A premature summary judgment also denies petitioner Ernest McDuffie III d.b.a. D & M Contracting Company his constitutional rights provided to Black African-Americans under the Equal provision of The U.S. Constitution 14 Amendment which states in Section 1.

"All persons born or naturalized in The United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of Life, Liberty; or property without due process of Law: nor deny to any person within its jurisdiction the equal protection under the Law."

Black African-American businesses in Jacksonville, Florida are denied participation in public contracting opportunities, they are deprived of Liberty that is provided under the 14th Amendment of the Constitution.

The freedom and privilege to enjoy all the rights granted by the United States and a particular state's constitution, as well as other rights such as right to earn a living, acquire knowledge, and marry, refers to the fullest scope of freedom one has, but at

the same time limits those freedoms so as not to interfere with another person's exercise of them. "The Due Process clause requires that termination of a property right to continued employment must be preceded by notice and an opportunity for a hearing on the matter." Adams v. Sewell. No. 90-3645.

CONCLUSION

The initial burden of production pursuant to Federal Rule 56, was not met by Respondent the S.B.A. when it moved for summary judgment. The granting of summary judgment without first meeting the requirements of Rule 56, of affirmatively demonstrating that there is no evidence in the record to support a judgment for the non-movant, and the overlooking or ignoring of evidence on file at the time of the ruling, which stalled petitioner right to due process of the laws, is guaranteed by the Fourteenth Amendment of United States Constitution. For these reasons the Summary Judgment should be denied.

For the foregoing reasons, the petition for writ of certiorari should be granted.

The Court of Appeals deprived the petitioner of due process.

Respectfully submitted,

Ernest McDuffie, III, pro se
8803 Yeoman Drive
Jacksonville, FL 32208
904-765-3149
May ___, 2000

APPENDIX

[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED

U.S. COURTS OF APPEALS
NO. 99-2059
ELEVENTH CIRCUIT
Non-Argument Calendar
DEC 30 1999
THOMAS K. KAHN
CLERK

D.C. Docket No. 97-00118-CV-J-20A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ERNEST MCDUFFIE, III, individually
and d.b.a. D & M Contracting Co.,
Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida
(December 30, 1999)

Before
TJOFLAT, BARKETT and HULL, Circuit Judges.

PER CURIAM:

Ernest McDuffie, III appeals the district court's order granting summary judgment to the United States, in its action for a debt repayment to the Small Business Administration (SBA), 28 U.S.C. §§ 1331, 1345.

This Court reviews grants of summary judgment de novo, using the same legal standard as the district court. Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1374(11th Cir. 1996). This Court does not consider arguments raised for the first time on appeal. See Narey v. Dean, 32 F.3d 1521, 1526-27 (11th Cir. 1994)(stating that this Court will generally not consider an issue first raised on appeal, with five exceptions that do not apply here.) Review of discovery orders is for abuse of discretion. Brooks v. United States, 837 F.2d 958, 961 (11th Cir. 1988).

Upon review of all relevant pleadings and orders, and the briefs of the parties, we find no reversible error.

We conclude that there is no genuine issue as to any material fact that McDuffie owed the debt to the SBA. The magistrate's denial in part of certain discovery request did not constitute an abuse of discretion. McDuffie's remaining arguments are either merits or improperly before this Court.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH
CIRCUIT
No. 99-2059-JJ
FEB 7 2000
THOMAS K. KAHN

CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ERNEST MCDUFFIE, III, individually,
and d.b.a. D & M Contracting Co.,
Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: TJOFLAT, BARKETT, AND HULL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant is DENIED.

ENTERED FOR THE COURT:
UNITED STATES CIRCUIT JUDGE

ORD-41

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
No. 99-2059-JJ
FEB 24 2000
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ERNEST MCDUFFIE, III, individually,
and d.b.a. D & M Contracting Co.,
Defendant-Appellant,

On Appeal from the United States District Court for the Middle District of Florida

ORDER:

(X) The motion of Appellant, Ernest McDuffie, for (X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

/S/Frank M. Hull
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
For the Eleventh Circuit

No. 99-2059 **FILED**
Non-Argument Calendar
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 30 1999

District Court No. 97-0018-CV-J-20A
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellant

versus

ERNEST MCDUFFIE,III, individually and d.b.a. D & M Contracting Co.,
Defendant-Appellant

Appeal from the United States District Court for the Middle District of Florida

Before TJOFLAT, BARKETT and HULL, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby and AFFIRMED;

It is FURTHER ORDERED THAT defendant-appellant pay to the plaintiff-appellee, the costs on appeal to be taxed by the Clerk of Court.

Entered: December 30, 1999
For the Court:
Thomas K. Kahn, Clerk
By:
Deputy Clerk

ISSUED AS MANDATE: FEB 24 2000

Ernest McDuffie III
8803 Yeoman Drive
Jacksonville FL 32208

February 24, 2000
RE: 99-2059-JJ USA v. McDuffie
DC DKT NO.: 97-00118 CV-J-20A
TO: Sherry L. Loesch
CC: Ernest McDuffie III
CC: Susan Roark Waldron
CC: Ralph J. Lee
CC. Lisa Stotsbery Still
CC: Tamra Phipps
CC: Administrative File

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FILED
98 OCT 14 PM 3:13
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES OF AMERICA,
Plaintiff,

v. **Case No.97-118-Civ-J-20A**

ERNEST McDUFFIE III, etc., et al.,
Defendants.

ORDER

This matter is before the Court upon Plaintiff's Motion for Summary judgment (Doc. No. 30, filed Nov. 26, 1997). Plaintiff moves the Court for: 1) the entry of a judgment by default against Defendants American General Finance, Inc.; Storage Trailer Rental, Inc.; Sunniland Corporation; First Union National Bank of Florida; Commercial Interiors, Inc.; and Floor Expressions, Inc., and 2) for summary judgment against defendants Ernest McDuffie III, individually and d/b/a D & M Contracting Company; Magadelene Wright McDuffie,; Melanese D. Way; Duval Count Hospital

Authority; Barnett Recovery Corporation; and Kevin L. Davis.

I. Entry of Default Judgment

Defendants American General Finance, Inc.; Storage Trailer Rental, Inc.; Sunniland Corporation; First Union National Bank of Florida; Commercial Interiors, Inc.; and Floor Expressions, Inc.

Have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure. Due to the aforementioned Defendants failure to defend, the Plaintiff requested the Clerk of the Court for an entry of default. The Clerk's entry of default was field of June 6, 1997. See Doc. No. 29.

Accordingly, it is hereby

ORDERED AND ADJUDGED that a judgment of default, pursuant to Fed. R. Civ. P. 55(A)(2), shall be entered against Defendants American General Finance, Inc.; Storage Trailer Rental, Inc.; Sunniland Corporation; First Union National Bank of Florida; Commercial Interiors, Inc,; and Floor Expressions, Inc.

II. Summary Judgment

Defendant Ernest McDuffie III, individually and d/b/a D & M Contracting Company, executed and delivered to Barnett Bank of Jacksonville, N.A. his promissory note (the Note) in the amount of $300,000.00. The Note was a 7(a) loan under the Small Business Act. To secure repayment of the Note, Defendants Magadelene Wright McDuffie and

Melanese D. Way executed and delivered guarantees encumbering certain real properties. See Doc. 31, filed Nov. 26, 1997 (stating legal descriptions of the real properties). Required payments have not been

made under the terms of the Note, even though demands have been made upon Defendants Ernest McDuffie, Magadelene McDuffie, and Melanese Way. The amount of the Note due is as follows:

Unpaid Principal Balance:	**$233,282.87**
Interest Accrued through November 19, 1997[1]:	**$ 90,526.01**
Total:	**$323,808.88**

The Plaintiff seeks summary judgment to enforce its lien on the note, mortgage, and guaranties at issue. Defendant Ernest McDuffie argues that summary judgment should be denied because he has not had an opportunity to make a full discovery.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(C). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are

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[1] Interest continues to accrue at the daily rate of $54.33 to date of sale and taxes advance from the date of the judgment of this foreclosure until the date of foreclosure sale.

no genuine issues of material fact that should be decided at trial. Celotex Corp. B. Catrett 477 U.S. 317 (1986); Clark v. Coats & Clark, Inc., 929 F. 2d 604 (11th Cir. 1991). A Moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the non-moving

party's case. Celotex, 477 U.S. At 325. Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. Id. When a moving party has discharged its burden the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. Id. At 324.

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, Key West Harbor v. City of Key West, 987 F.2d 723, 726 (11th Cir. 1993), and resolve all reasonable doubts in that party's favor, Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir. 1989). The nonmovant need not be given the benefit of every inference, but only of every "reasonable" inference. Brown v. City of Clewiston, 848 F.2d 1534, 1540 n. 12 (11th Cir. 1988). The Eleventh Circuit has explained the reasonable standard:

In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing

each against the abstract standard of reasonableness." [Citation omitted]. The opposing party's inferences need not be more probable than those inferences in favor of themovant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for thetrier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. August Iron and Steel Works v. Employers Insurance of Wausau, 835 F.2d 855, 856 (11th Cir. 1988). It must be emphasized that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgment motion. Rather, "the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nommoving party." Id. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. At 251-52.

Mr. McDuffie argues that he borrowed and 8(a) loan rather than a 7(a) loan, and that the Plaintiff failed to accord him his rights under and

8(a) loan. Even if Mr. McDuffie's allegations are true, they are not relevant to this case. See Doc. 40, filed May 18, 1998 (holding that information about 8(a) loans is not discoverable). Mr. McDuffie has failed to demonstrate any genuine issue of material fact. It is undisputed that Mr. McDuffie signed and executed the Note, and that the Plaintiff is the holder of the Note, who is entitled to payment. The Court finds that Defendants Ernest McDuffie, Magadelene

McDuffie, and Melanese Way are in default of the Note, and that the Plaintiff's rights or interests are superior to any of the other Defendants' possible rights or interests.

Accordingly, it is ORDERED AND ADJUDGED that:

1) Plaintiff's Motion for Summary Judgment (Doc. No. 30) is GRANTED;

2) The Clerk shall enter judgment against Defendant, Ernest McDuffie III, individually and d/b/a D & M Contracting Company, and in favor of Plaintiff, the United States of America, in the following amounts:

a) principal in the amount of $233,282.87

b) interest in the amount of $90. 526.01 as of Nov. 19, 1997, plus interest accruing at the daily rate of $54.33;

c) court costs in the amount of $493.44;

d) reasonable costs to advertise and sell the real property; and

e) such other costs of litigation as allowed by law.

3) Defendant Ernest McDuffie III, individually and d/b/a/ D & M Contracting Company is obligated for any deficiency after the sale of the real property.

4) The Clerk shall close the file.

DONE AND ENTERED at Jacksonville, Florida this 14th day of October 1998.

HARVEY E. SCHLESINGER
United States District Judge
Copies to :
Pro Se Litigants
Counsels of Record
Law Clerk
Garry Randolph, Deputy Clerk